

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
DUNGENESS FARMS, INC.,)
Appellant,)
vs.)
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)
Respondent.)

PCHB No. 70-21

FINDINGS OF FACT,
CONCLUSIONS AND ORDER

The Pollution Control Hearings Board, acting within the ambit to which it was limited by the Order of the Superior Court of the State of Washington for Thurston County, made and entered in Thurston County Superior Court Cause No. 44065 May 15, 1972, conducted a formal hearing in the above-numbered and captioned appeal on October 11, November 8 and 10, 1972 in its hearing room (311 Insurance Building, State Capitol Campus, Olympia, Washington).

The appellant, Dungeness Farms, Inc., was represented by its attorneys K. David Lindner and Karl Ege of the firm of Bogle, Gates, Dobrin,

1 Wakefield and Long, and the respondent, State of Washington, Department
2 of Ecology, was represented by Nick Dufford, Assistant Attorney General.

3 Witnesses were sworn and testified and exhibits were offered and
4 admitted; at the conclusion of the testimony, oral arguments were
5 presented by attorneys for both the appellant and respondent, which
6 supplemented the written briefs submitted on behalf of both the appellant
7 and respondent before the hearing opened.

8 Thereafter on January 31, 1973, the Pollution Control Hearings
9 Board made and entered its Proposed Findings of Fact, Conclusions and
10 Order. (There had been a change in the membership of the Board on
11 January 15, 1973, and the Proposed Findings of Fact, Conclusions and
12 Order were signed by the two members who had participated in the hearings.)

13 Exceptions to the Proposed Findings of Fact, Conclusions and Order
14 were filed by the appellant on March 15, 1973, and the respondent filed
15 a Reply to the Exceptions on April 3, 1973.

16 After a review of the record and a careful consideration of the
17 Exceptions taken, the Pollution Control Hearings Board enters the
18 following Findings of Fact, Conclusions and Order:

19 FINDINGS OF FACT

20 1.

21 The Pollution Control Hearings Board has adopted as its first
22 Finding of Fact certain parts of the Stipulation to which the appellant
23 and respondent had agreed prior to the formal hearing; i.e.,

24 A. Appellant owns certain parcels of real property situate in
25 Clallam County, Washington, which consist of approximately
26 eighty-eight acres together with adjoining tidelands. The

27 FINDINGS OF FACT,
CONCLUSIONS AND ORDER

1 legal description of appellant's real property is as set forth
2 in Exhibit B to appellant's Amended (Second) Notice of Appeal.

3 B. Respondent by an Order signed by its Director on December 4,
4 1970, designated and established the Dungeness River Flood
5 Control Zone No. 17. Said Order is reproduced as Exhibit A
6 to appellant's Amended (Second) Notice of Appeal.

7 C. Dungeness River Flood Control Zone No. 17 includes all of
8 appellant's real property described in Exhibit B to appellant's
9 Amended (Second) Notice of Appeal.

10 D. In establishing said flood control zone, respondent did not
11 follow the "contested case" procedure set forth in
12 Chapter 34.04 RCW and Chapter 508-08 WAC.

14 E. In establishing said flood control zone, respondent did not
15 follow the "rule making" procedure set forth in Chapter 34.04
16 RCW and Chapter 1-12 WAC.

17 F. Respondent caused notice of its intention to establish Dungeness
18 River Flood Control Zone No. 17 to be published in the Port
19 Angeles Evening News, Port Angeles, Clallam County, Washington
20 once in each of three consecutive weeks, first publication
21 being on September 11, 1970, and the last on September 25, 1970.
22 (A true copy of the affidavit of publication is an exhibit
23 herein (Exhibit 2).)

24 G. Respondent conducted a hearing for the purpose of receiving and
25 hearing objections to the establishment of the zone commencing
26 at 8:00 p.m., September 28, 1970, in the Superior Court court-
27 room in the Clallam County Courthouse, Port Angeles, Washington.

28 FINDINGS OF FACT,
29 CONCLUSIONS AND ORDER

1 Respondent prepared minutes of this hearing. (A true copy
2 of the minutes is an exhibit herein (Exhibit 3).)

3 H. Respondent gave notice of its intention to adopt an order
4 establishing Dungeness River Flood Control Zone No. 17 on
5 November 20, 1970 and November 23, 1970. A true copy of a
6 certificate of service of such notice is an exhibit herein
7 (Exhibit 4).)

8 I. Respondent held a meeting open to the public at 10:00 a.m.,
9 December 4, 1970, in the Department of Ecology offices,
10 Olympia, Washington. At said meeting the order was adopted
11 by the Director of said Department. Respondent prepared
12 minutes of this meeting, a true copy of which is an exhibit
13 herein (Exhibit 6).

14 J. By letter dated December 13, 1971, respondent established the
15 floodway/floodway fringe boundary on appellant's property. A
16 copy of said letter is an exhibit herein (Exhibit 7).

17 II.

18 The appellant admits that it had actual notice of the hearing
19 referred to in Finding of Fact I.G. before it occurred.

20 III.

21 The Department of the Army, Seattle District, Corps of Engineers,
22 hereinafter called 'the Corps of Engineers, has qualified personnel,
23 expertise, basic information and facilities to undertake basic research
24 data study for flood plain identification on the rivers of Washington.
25 It was employed by the State of Washington in 1970 to make a Basic
26

27 FINDINGS OF FACT,
CONCLUSIONS AND ORDER

1 Research Data Study for Flood Plain Identification on 42 rivers and
2 streams in the State of Washington, including the Dungeness River.

3 IV.

4 Included in the data completed by the Corps of Engineers relating
5 to the flood plain of the Dungeness River was a map purportedly showing
6 the plain for a one hundred year flood on that river. This was
7 concededly a factor in determining the location of the flood control
8 zone lines on portions of the river.

9 During the hearing a question arose as to whether the lines of the
10 flood plain shown on the map prepared by the Corps of Engineers were those
11 of the one hundred year or those of the two hundred year flood plain on
12 the Dungeness, however, that question remains unresolved so far as the
record on this hearing is concerned.

14 V.

15 That the property of the appellant within the Dungeness River Flood
16 Zone No. 17 is at the mouth of the river, where it flows into the Strait
17 of Juan de Fuca; that in such a location the tidal action is the primary
18 factor in the determination of the flood zone for a river.

19 CONCLUSIONS

20 I.

21 We conclude as matter of fact and law that in its establishment of
22 the Flood Control Zone on the Dungeness River, the State of Washington,
23 Department of Ecology, proceeded properly in following the procedure
24 provided in Flood Control Zone Act, Chapter 86.16 RCW (specifically
86.16.060-070), and that the establishment of the Flood Control Zone by
26 the Department of Ecology was not a "contested case" within the purview

27 FINDINGS OF FACT,
CONCLUSIONS AND ORDER

1 of the Administrative Procedures Act (RCW 34.04.010(3)) nor did the
2 establishment of a Flood Zone constitute rule making within the purview
3 of the Administrative Procedure Act (RCW 34.04.010(2)).

4 II.

5 The respondent, State of Washington, Department of Ecology, was
6 neither arbitrary nor capricious in relying upon the data and information
7 furnished by the U. S. Army Corps of Engineers with reference to the
8 location of the one hundred year flood line on the Dungeness River, and
9 was entitled to rely on that information and the expertise of the U. S.
10 Army Corps of Engineers in its determination of the flood zone lines.

11 III.

12 If in fact, the information as to the location of the one hundred
13 year flood line furnished by the U. S. Army Corps of Engineers was in
14 error, it would in no way prejudice the appellant since the flood zone
15 lines through their property located at the mouth of the Dungeness
16 River were determined primarily on the basis of the effect of tidal
17 action on the river flow.

18 Based on the foregoing Findings of Fact and Conclusions, the
19 Pollution Control Hearings Board enters the following

20 ORDER

21 Having specifically determined the issues referred to the Pollution
22 Control Hearings Board by the Thurston County Superior Court in favor of
23 the respondent, Department of Ecology, the Pollution Control Hearings
24 Board affirms insofar as it has the jurisdiction so to do, the action of
25 the State of Washington, Department of Ecology, in establishing Dungeness
26 River Flood Control Zone No. 17. The foregoing Findings of Fact,

27 FINDINGS OF FACT,
CONCLUSIONS AND ORDER

1 Conclusions and Order, are, of course, subject to an appeal; however, if
2 no appeal is taken within the statutory period, this matter is remanded
3 back to the Thurston County Superior Court, pursuant to its Order of
4 May 15, 1972 in Thurston County Superior Court Cause No. 44065.

5 DONE at Olympia, Washington this 1st day of May, 1973.

6 POLLUTION CONTROL HEARINGS BOARD

7 Walt Woodward
8 WALT WOODWARD, Chairman

9 James T. Sheehy
10 JAMES T. SHEEHY, Member

11 Mr. W. A. Gissberg became a member of this Board on January 15,
12 1973 and does not care to participate in this matter which he did not
13 hear originally.
14
15
16
17
18
19
20
21
22
23
24

26 FINDINGS OF FACT,
27 CONCLUSIONS AND ORDER